SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 785

SONJA STUMO,

Petitioner,

vs.

UNITED AIR LINES, INC., A CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS, D. S. RITNER AND R. W. HARDESTY, UNITED AIR LINES, INC., IN OPPOSITION.

STUART BERNSTEIN,
ARTHUR J. KOWITT,
Counsel for Respondents D. S. Ritner and R. W. Hardesty, United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
Of Counsel.

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BRIEF FOR RESPONDENTS, D. S. RITNER AND R. W. HARDESTY, UNITED AIR LINES, INC., IN OPPOSITION.

QUESTIONS PRESENTED.

1. Whether a discharged employee of an airline who invokes the jurisdiction of the System Board of Adjustment—an agency established by contract pursuant to the requirements of Title II of the Railway Labor Act, may later disavow the Board's jurisdiction and turn to the courts for relief.

2. Whether the System Board's jurisdiction over petitioner's discharge grievance is, in any event, exclusive.

3. Whether the requirement that petitioner exhaust her remedy before the System Board results in a denial of

her constitutional rights to jury trial or due process, and whether, in any event, these constitutional issues are ripe for judicial consideration prior to action by the System Board.

STATEMENT.

The petition is replete with factual misstatements, most of which have no material bearing upon the issues before this Court. Those that are material will be considered in the Argument which follows.

ARGUMENT.

I.

HAVING SUBMITTED HER GRIEVANCE TO THE SYSTEM BOARD, PETITIONER MAY NO LONGER INVOKE THE JURISDICTION OF THE COURTS.

The question whether petitioner's discharge was for just cause is an issue which goes to the merits of her underlying grievance. The Court below did not affirm dismissal of her complaint on the merits. Rather, it held that resolution of that issue rests with the System Board of Adjustment—not the federal district courts.

Although United argued below that the jurisdiction of the System Board is exclusive and that the exception carved out in *Moore** affording petitioner a choice of forums is no longer valid, the majority found it unnecessary to decide that question. Instead it based its holding on the proposition that even if *Moore* was available to give petitioner a choice of proceeding in court for damages or proceeding before the System Board for reinstatement, she made her choice when she submitted her case to the Board—a choice which she could not later disavow in favor of an action at law.

Petitioner seems to have reconciled herself to the fact that even under *Moore* an irrevocable election takes place once the jurisdiction of the Board is invoked.** She even

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* *Moore* v. *Illinois Cen. Ry. Co.*, 312 U. S. 630 (1941).

** Indeed, there is abundant authority to the effect that a binding election takes place under *Moore* as soon as the contract grievance procedures are set into motion by the grievant. See *Scott* v. *National Airlines, Inc.*, 150 So. 2d 237, 239 (Fla., 1963); *Galley* v. *Pennsylvania R. R. Co.*, 220 F. Supp. 190, 193 (S. D. N. Y., 1963),

concedes that her exclusive bargaining agent, the Air Line Pilots Association ("ALPA"), submitted her case to the Board on June 15, 1966 (Petition 4). She argues, however, that ALPA did not take this action at *her* request, but at the request of "a local union officer," and that neither she nor her attorney had any knowledge of the submission (Petition 4). This, we submit, is a serious misstatement of the record.

The fact is that ALPA made the submission—not at the request of "a local union officer"—but at the request of petitioner herself (R. 101, 197). And petitioner made no claim to the contrary until *after* the Court of Appeals affirmed the dismissal of her complaint. It was then that she moved to "modify the majority opinion," submitting in support thereof affidavits of her attorney and a local union official tending to disavow ALPA's authority.

In any event, petitioner's conduct prior to the submission tends to confirm rather than deny ALPA's authority. The evidence shows that petitioner repeatedly advised United to keep ALPA's legal department apprised of all developments in her case (R. 281, 287, 294); that she was accompanied at the third and fourth step hearings by Miss C. Holle, ALPA's local chairman (R. 201, 202-03, 289, 297);

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aff'd, 324 F. 2d 502 (C. A. 2, 1963); *Peoples* v. *Southern Pacific Co.*, 232 F. 2d 707 (C. A. 9, 1956); *Pacilio* v. *Pennsylvania R. R. Co.*, 230 F. Supp. 752, 754 (S. D. N. Y., 1964); *Larsen* v. *American Airlines, Inc.*, 313 F. 2d 599, 603 (C. A. 2, 1963).

The fact that petitioner may have followed the contract grievance route through all four management levels under the mistaken notion that this was a prerequisite to a suit for damages is hardly adequate to preclude a binding election. *Moore* itself holds that there was no such prerequisite (312 U. S. at 636; 112 F. 2d 959, 966 (C. A. 5, 1940)); and the collective bargaining contract upon which the petitioner relies to sustain her claim makes it clear that, once the grievance procedure commences, the grievant is bound to pursue each and every contract appeal up to and including a final appeal to the System Board. Failure to take such an appeal renders an adverse decision at the previous level final and binding. (R. 58, 60, Sections XII-C-1 and XIII-E.)

and that she consulted with ALPA's legal staff at every stage of the grievance procedure (R. 197). At no time prior to the decision by the Court of Appeals did petitioner give the slightest hint that ALPA was lacking in authority. In fact, even after her case was submitted to the Board, Mr. Archer (her then "legal advisor") wrote to United—not to complain that her submission by ALPA was unauthorized—but to obtain additional information about the Board (R. 321).*

Under these circumstances, petitioner's belated efforts to deny ALPA's authority must be rejected, thus confirming the decision of the court below that the jurisdiction of the Board irrevocably attached once the submission was made by ALPA on her behalf.

II.

THE BOARD'S JURISDICTION OVER PETITIONER'S GRIEVANCE IS IN ANY EVENT EXCLUSIVE.

It is highly doubtful that petitioner had any choice—even at the outset—but to take her case to the System Board. Although, as noted earlier, the Court below never reached the question, it appears that the *Moore* exception upon which petitioner relies is no longer valid. Moore was premised on the notion that a discharged employee who elected to treat his discharge as final could proceed in court for damages without disturbing the exclusive jurisdiction of the National Railroad Adjustment Board** over contract grievances since the court's determination would have no

* That petitioner consciously allowed her grievance to be submitted to the Board is perhaps best evidenced by the statement in her petition that she elected not to withdraw her grievance from the Board because the law at that time regarding the status of *Moore* was in a "judicial state of flux." (Petition 8.)

** *Moore* arose under Title I of the Railway Labor Act which is applicable to employees of railroads. Airline employees are governed by Title II of the Act which provides for the establishment of system boards of adjustment pending the establishment of a

effect on "the future relations of the parties". *Slocum* v. *D. L. & W. R. R. Co.*, 339 U. S. 239, 244 (1950). *Moore* has since been limited to discharge cases. It has only been applied within the field of the Railway Labor Act; and it has been available as a federal remedy only where diversity was present and where applicable state law did not require exhaustion of contract remedies. See *T. W. A.* v. *Koppal*, 345 U. S. 653 (1953); *Pennsylvania R. R. Co.* v. *Day*, 360 U. S. 548 (1959).

This was the narrow status of *Moore* at the time of *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965). There the Court, in refusing to extend *Moore* beyond the Railway Labor Act, adopted reasoning that prompted Justice Black in dissent to remark that the final demise of *Moore*, even as limited, was "just about as certain as the changing of the seasons". (379 U. S. at 667.) The *Maddox* majority reasoned that since the advent of *Moore* it has come to be recognized that labor contracts subject to the Railway Labor Act are governed by federal law—not state law—thus removing "a major underpinning for the continued validity of . . . *Moore* . . . in the field of the Railway Labor Act . . .". (379 U. S. at 655.)

More recently, in *Walker* v. *Southern Ry. Co.*, 385 U. S. 196 (1966), *Moore* was given what appears to have been its last reprieve. In holding that a discharged railroad employee could proceed in court under *Moore* without exhausting his contract remedy before the National Railroad Adjustment Board, the majority left no doubt that it was doing so only because the 1966 Amendments to Title I of the Railway Labor Act (which eliminated certain defects in NRAB procedures) were not yet "available to petitioner," having

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National Air Transport Board comparable in composition and jurisdiction to the NRAB in the railroad industry (45 U. S. C. Sections 184, 185). As yet, a national board has not been established for the airline industry. See *I. A. M.* v. *Central Airlines, Inc.*, 372 U. S. 682, 685-89 (1963).

been adopted subsequent to the initiation of that proceeding. (385 U. S. at 198-99.)* The plain fact is, however, that the 1966 Amendments are now effective and they apply to all cases pending or instituted on or after June 20, 1966. *B. R. T.* v. *Denver & Rio Grande Western R. R. Co.*, 370 F. 2d 833 (C. A. 10, 1966), *cert. denied*, 386 U. S. 1018 (1967). Hence, it follows there is no longer any basis for sustaining *Moore*.

As clear as this is in the railroad industry, it is even clearer in the airline industry where the defects found in the National Railroad Adjustment Board's procedures never existed. In fact, it was the favorable experience of the airline system boards that Congress relied upon in fashioning the 1966 Amendments to the Act. See *Hearings before the House Subcommittee on Transportation and Economics of the Committee on Interstate & Foreign Commerce on H. R. 706*, 89th Cong. 1st Sess. at pp. 97-8, 101-3, 197-8 (1965).

Nor is petitioner's position enhanced by her argument that "federal substantive law" applies since, as seen in *Maddox* (379 U. S. at 652), federal law requires exhaustion of contract remedies. Petitioner's dilemma is this: If she relies upon *Moore* (as she must in order to avoid the federal rule of exhaustion) she is referred to the law of Illinois which also follows the doctrine of exhaustion.** Thus, no matter where petitioner turns, she is unable to avoid the exclusive jurisdiction of the Board.

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* Those defects concerned the speed of the NRAB's procedures and the scope of appeal, both of which were remedied by the 1966 amendments to the Act. P. L. 89-456, 80 Stat. 208, 209; *House Report No. 1114 to accompany H. R. 706, Committee on Interstate and Foreign Commerce*, 89th Cong. 1st Sess. p. 3 (1966).

** See *Anson* v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (C. A. 7, 1955), *cert. denied*, 350 U. S. 840 (1955); *Gordon* v. *Thor Power Tool Co.*, 55 Ill. App. 2d 389, 400, 205 N. E. 2d 55, 61 (2d Dist., 1965); *Long* v. *Illinois Central R. R. Co.*, 32 Ill. App. 2d 103, 109-10, 176 N. E. 812, 814-5 (3rd Dist., 1961), *cert. denied*, 369 U. S. 858 (1961). It may also be noted that *Walker* itself was a diversity case and the court there reasserted the diversity basis for the *Moore* doctrine. (385 U. S. at 196-97.)

III.

THERE IS NO BASIS FOR PETITIONER'S ALLEGED DENIAL OF CONSTITUTIONAL RIGHTS PARTICULARLY WHERE AS HERE THE SYSTEM BOARD HAS NOT BEEN GIVEN AN OPPORTUNITY TO ACT.

Petitioner's argument (Petition 6-7) that application of the doctrine of exhaustion results in a denial of her constitutional right to jury trial under the Seventh Amendment ignores several decades of labor law favoring arbitration as the appropriate mode of redress for contract grievances. *Textile Workers* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *Steelworkers* v. *Warrior Gulf & Navigation Co.*, 363 U. S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960). It also implies that the Supreme Court itself imposed an unconstitutional requirement on *Maddox* by relegating him to the arbitration process for redress of his severance pay grievance. What the petitioner fails to perceive is that no violation of the Seventh Amendment results from congressional abolition or modification of common law remedies, even assuming the rather dubious proposition that the action brought here for wrongful discharge is one that was recognized at common law. *Silver* v. *Silver*, 280 U. S. 117, 122 (1929); *Mountain Timber Co.* v. *Washington*, 243 U. S. 219 (1917).

Petitioner's further contention that the Board will somehow violate her constitutional right of "due process" (Petition 10-11) is equally without merit. Despite the implications in the petition that plaintiff is a victim of hostile and invidious discrimination by her employer and her union, there is nothing in the record to substantiate such a charge.*

* The record utterly belies petitioner's assertions (Petition 5, 10-11) that United failed to keep her attorney fully informed as to the disposition of her grievance. The fact is that United gave

There is merely petitioner's unfounded fear that a non-member of the union cannot possibly obtain a fair and impartial hearing before the Board. This, despite the fact that the contract provides (a) for the appointment of a neutral in the event of a deadlock between the company and union members of the Board and (b) for the immediate seating of a neutral even without a deadlock "by mutual agreement of the parties." (R. 62, 63; Sections XIII-L and XIII-H).* Certainly fears such as this afford no basis for petitioner's extraordinary request for injunctive relief to prevent her case from being heard by the Board.**

Mr. Archer copies of all relevant papers in petitioner's case as soon as it was informed of his status as her attorney, *i.e.*, after a third step of the grievance procedure (R. 202, 293). It gave him timely notice of the fourth step hearing (R. 202, 296); and, despite the fact that Mr. Archer did not appear at the hearing, a copy of the resulting decision was promptly sent to him (R. 203-04, 302). Finally, United gave him all the information he requested concerning the workings of the System Board (R. 203-04, 305). While it is true that Mr. Archer was not notified of a hearing date before the Board, this was only because no hearing date was scheduled at the time of the filing of the complaint (R. 27). As for United's alleged failure to respond to Mr. Archer's letter of June 21, 1966 (R. 321), the record shows that a copy of that letter was sent to ALPA and that ALPA replied to Mr. Archer giving him the information he requested (R. 204-05, 323). The additional information sought by Mr. Archer in his letter of June 28, 1966 (R. 322), was, in fact, previously supplied to either him or his client (R. 27, 112, 204-05, 323).

* Despite petitioner's intimations to the contrary (Petition 5, 9-10), there is nothing in the record to suggest that plaintiff's request for the immediate appointment of a neutral was rejected by the parties. On the contrary, several weeks before the filing of the complaint, United advised petitioner's attorney that once a hearing date was established, it would be willing to discuss with him "the desirability of having a neutral in attendance at the hearing." (R. 305-06.)

** Plaintiff refers in her petition (p. 6) to "an agreement between the parties" which allegedly renders "moot" her request for an appellate court stay. The only agreement to which she could possibly have reference is one between counsel to the effect that no attempt would be made to present her grievance to the Board until after the Court of Appeals had ruled on her motion for a stay. But once that request was denied, the parties were under no obligation, contractual or otherwise, to withhold action before the Board.

Although there is no reason to believe that petitioner's grievance will not receive fair consideration by the Board, any complaints which petitioner may have in this regard can be brought to the attention of the courts after the Board has acted, if indeed petitioner would have any complaint at that time.* The case of *Edwards* v. *Capital Airlines, Inc.*, 176 F. 2d 755 (C. A. D. C., 1949), *cert. denied*, 338 U. S. 885 (1949) upon which the petitioner relies is a good example. There the court held that a System Board award rendered without the presence of a neutral was judicially reviewable at the instance of a minority group who were not members of the union. The evidence showed that the union was actively "hostile" and "aggressively opposed" to their claims. Significantly, the court commented that even in those extreme circumstances anyone who would seek to upset a System Board award on grounds of bias or prejudice "must bear a considerable burden"; it therefore remanded the case to the Board for further clarification. (176 F. 2d at 760.) Assuming that petitioner here is willing to undertake such a burden, the time to do so is *after* the Board has acted—not now when there is nothing before the court but petitioner's vague speculations as to what *might* happen if the Board were to proceed.

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* See *Arnold* v. *United Air Lines, Inc.*, 296 F. 2d 191, 196 (C. A. 7, 1961); *Wooley* v. *Eastern Air Lines, Inc.*, 250 F. 2d 86, 91 (C. A. 5, 1957); *cert. den.*, 356 U. S. 931 (1958); *Sigfred* v. *Pan American World Airways, Inc.*, 230 F. 2d 13, 17 (C. A. 5, 1956); *cert. den.*, 351 U. S. 925; *Ferro* v. *R. E. A., Inc.*, 296 F. 2d 847, 852-3 (C. A. 2, 1961).

CONCLUSION.

If there is any novelty about this case, it lies in the relief sought by petitioner—not in the decision of the court below. It may be that ultimately this Court will want to take the opportunity to formally announce the final demise of *Moore*. That opportunity, however, is not fairly presented here. We respectfully submit, therefore, that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STUART BERNSTEIN,
ARTHUR J. KOWITT,
Counsel for Respondents, D. S. Ritner and R. W. Hardesty, United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
Of Counsel.

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